Occurring in New York, it was sufficient to supply jurisdiction to the local Courts, but this also seems to have been omitted from the consideration of the Court.

We commend the dissenting opinion of Justice Ingraham of the lower Court, and believe it to be a true exposition of the law as it should have been applied to the facts of the principal case.

LIABILITY OF RESTAURANT KEEPERS FOR THE LOSS OF GUEST'S PERSONAL PROPERTY.

The plaintiff entered defendant's restaurant, removed his overcoat, hung it on a hook about two feet from a table at which he had seated himself, and while eating his meal the coat was removed. *Held,* that the coat was laid off at the defendant's invitation, was actually delivered to the temporary custody and exclusive possession of the defendant, and that the defendant was therefore liable to the plaintiff for its loss. *Wentworth v. Riggs,* 139 N. Y. S., 1082.

At common law and in the majority of American jurisdictions an innkeeper is an insurer of the property of his guests committed to his care except where loss was due to the act of God, public enemies, or negligence of the guest or his servant *Robins v. Gray,* 2 Q. B., 501; *Norcross v. Norcross,* 53 Me., 163. In some jurisdictions this rule has been relaxed and the inkeeper is held to be merely *prima facie* liable. *Hulbert v. Hartman,* 79 Ill. App., 289; *Laird v. Eichold,* 10 Ind., 212; *Howe Mach. Co. v. Pease,* 49 Vt., 477. Keepers of restaurants are not innkeepers and are not subject to the same liabilities. *Ulzen v. Nichols,* (1894) 1 Q. B., 92; *Sheffer v. Willoughby,* 61 Ill. App., 263; *Carpenter v. Taylor,* (N. Y.) 1 Hilton, 193.

To make a restaurant keeper liable for the loss of an overcoat of a customer while such customer takes a meal or refreshments, it must appear that the coat was placed in the physical custody of the keeper of the restaurant or his servants, in which case there is an actual bailment, or that the overcoat was necessarily laid aside under circumstances showing at least notice of the fact and of such necessity to the keeper of the restaurant or his servants, in which case there is an implied bailment or constructive bailment, or that the loss occurred by reason of the insufficiency of the supervision exercised by the keeper of the restaurant for the pro-

tection of the property of customers temporarily laid aside. *Montgomery v. Ladjing,* (N. Y.) 39 Misc. Rep., 92. In *Ulzen v. Nichols, supra,* a case where an overcoat was lost by a customer in a restaurant, the Court says, "This appeal raises two questions, first, whether the defendant was a bailee of the coat; secondly, whether there was on his part any negligence, owing to a want of reasonable care." The doctrine as to the liability of restaurant keepers announced in the above cases is in harmony with the idea of bailment upon which the decision in the principal case purports to rest. The rule of liability which it announces is the generally accepted one and is undoubtedly correct, but the correctness of its application to the facts is open to question. There must be a bailment and a failure to use ordinary care to make the defendant liable.

To constitute a transaction a bailment there must be a delivery to the bailee, or his agents, and acceptance, either actual or constructive. *Houghton v. Lynch,* 13 Minn., 85; *Trunick v. Smith,* 63 Pa. St., 18; *Samuels v. McDonald,* 33 N. Y. Super. Ct. In case of actual delivery, such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, and such as will require a redelivery of it by him to the owner or other person entitled to receive it after the term of bailment has expired. *Fletcher v. Ingram,* 46 Wis., 191; *Samuels v. McDonald, supra.* If the delivery is constructive there must be an intention to transfer the possession of the property. *Sherman v. Commercial Printing Co.,* 29 Mo. App., 31; *Trunick v. Smith, supra.*

In all the adjudicated cases where the facts were similar to those of the principal case, the existence of a bailment, determined by the control of the defendant over the article in question, and negligence on the part of the bailee have been held necessary to make the defendant liable.

In *Pattison v. Hammerstein,* (N. Y.) 17 Misc. Rep., 375, the owner of a theater was not liable where a coat was taken from a hook in the box occupied by the plaintiff, though the hook was placed there for the articles of the occupants of the box and it was necessary for the convenience of the patrons of the box that it be so used. The Court said there could be no liability on the part of the defendant because there was no bailment, which implies a delivery.

Where clothing was taken from a room in a Turkish bathing establishment which had been assigned to the plaintiff the owner

was held liable for its loss. *Bird v. Everhard,* (N. Y.) 4 Misc. Rep., 104. But the defendant was not liable where money and jewelry were taken from the plaintiff's clothes left on a bench in a five-cent bathing establishment. *Schneps v. Sturm,* (N. Y.) Misc. Rep., 168. In the first case the plaintiff left his clothes in a place designated by the defendant, and, in so doing, placed them under the exclusive control for the time being of the defendant. In the other case the defendant did not profess to care for articles, further than to provide a general supervision over them. The Court well says: "The measure of the defendant's obligation to his patrons was the careful observance of that which the facts show he assumed to perform."

Similar questions have arisen where articles have been left by customers in stores and the Courts have applied the same rules. In *Woodruff v. Painter,* 150 Pa. St., 91,the plaintiff was preparing to buy a suit of clothes and, by the direction of the shopkeeper's salesman, placed his watch in a drawer. The watch disappeared and the defendant was held to be chargeable as a bailee. Here the delivery was evident and there was a bailment. In *Bunnell v. Stern,* 122 N. Y., 539, the plaintiff's cloak was taken while trying on another, she having laid it aside in the presence of a saleslady but not at her request, and the defendants were held liable. The Court, *per* Vann. J., says, "They (defendants) invited each lady who came there to buy a cloak, to remove the one she had on and try on the one they wished her to purchase. . . . The obligation of the defendants would not have been greater or different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had also requested her to take off her wrap and try on the one that he offered to sell her." On the other hand, in *Wamser v. Browning, King & Co.,* 187 N. Y., 87, the defendants were not liable where the plaintiff, at the request of a clerk, had gone into a part of the store alone, and, while trying on garments, his vest and contents were taken. The Court says: 'Had the clerk been present attending upon him (plaintiff) and the clothing had been laid aside by his invitation before his eyes so that he had an opportunity to watch and care for it, a different question would have been presented."

Following the foregoing cases, the rule was laid down in *Simpson v. Rourke,* (N. Y.) 13 Misc. Rep., 230, that a restaurant keeper is not an insurer, but is only required to use the ordi-

nary care called for under all the circumstances of the case. In another case where the defendant maintained a checking system and gave notice by his bill of fare and signs on the wall that he was not responsible for lost property unless checked, he was not liable for the loss of a customer's coat hung on a hook on the wall. *Duckworth v. Codington Co.*, 136 N. Y. S., 68. In this case the existence of a bailment was not even discussed. The same conclusion was reached in *Harris v. Childs' Unique Dairy Co.*, 136 N. Y. S., 160, where a coat was taken from a nail on the wall when the defendant maintained a checking system, gave notice that he was not responsible for lost property unless checked, and had a manager in attendance to protect the property of guests.

In view of the adjudicated cases reviewed it seems that the Court erred in holding the defendant liable in the principal case, when its decision purports to rest solely on the ground of bailment, it being extremely doubtful whether there was a delivery. The Court seems to consider the defendant liable if a bailment existed but did not mention negligence as a reason for defendant's liability as a bailee. Granting that there was a bailment, the defendant would not be liable if he used ordinary care. *Ulzen v. Nichols, supra; Simpson v. Rourke, supra.* The facts disclose no such degree of negligence as would render the defendant liable if he was in fact a bailee.